FILE COPY.

FILED
MAR 14
JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 67.

THE UNION AND PLANTERS' BANK OF MEMPHIS, TENNESSEE, PLAINTIFF IN ERROR,

vs.

THE CITY OF MEMPHIS AND JOHN ALSUP, TRUSTEE.

AND

No. 221.

THE UNION AND PLANTERS' BANK OF MEMPHIS, TENNESSEE, APPELLANT,

vs.

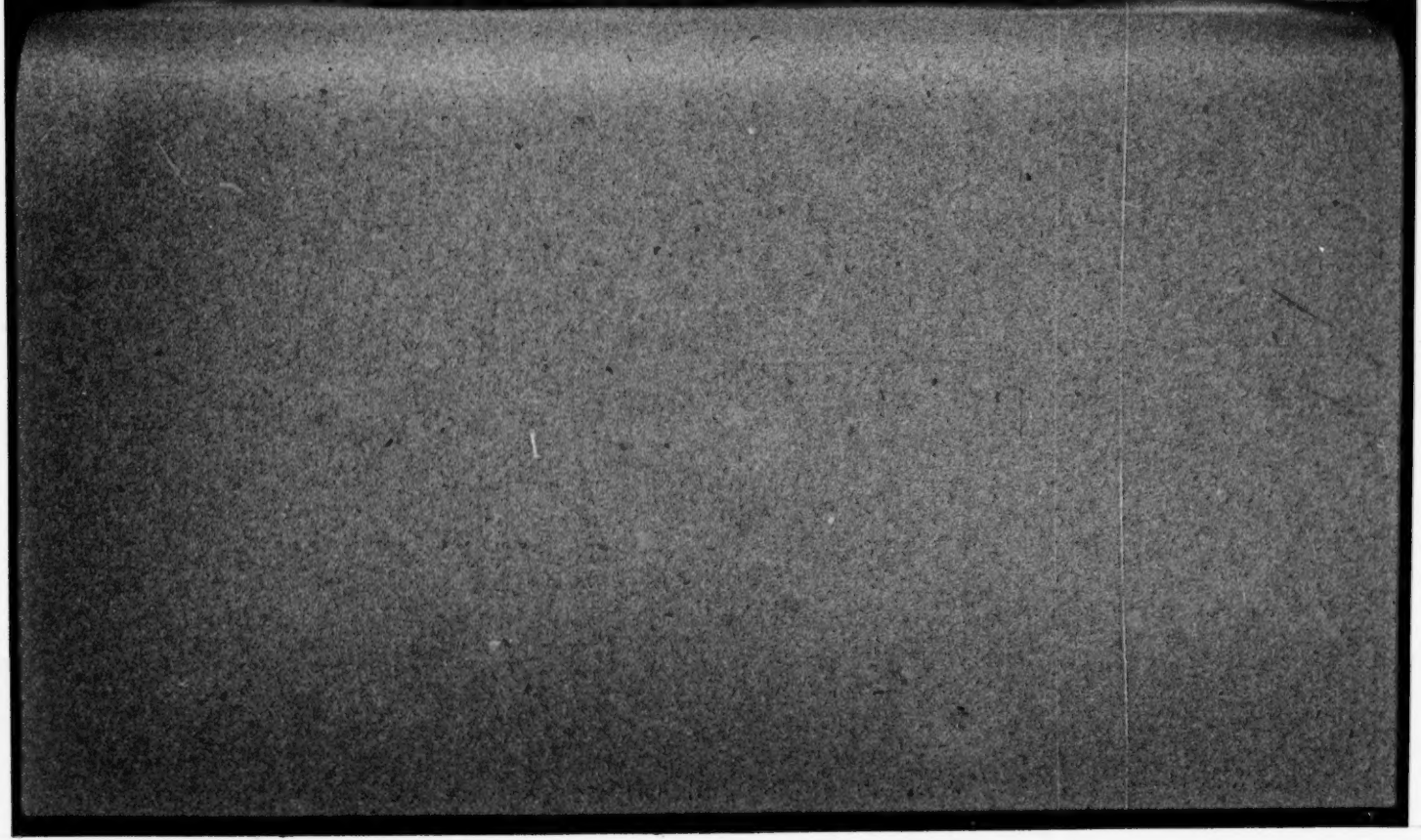
THE CITY OF MEMPHIS.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR AND APPELLEE.

JOHN H. WATKINS,
Counsel for City of Memphis.
Lucius E. Wright.

(18,069 and 18,369.)

[illegible] & [illegible], Printers, Washington, D. C. [illegible]



Supreme Court of the United States

OCTOBER TERM, 1902.

No. 67.

THE UNION AND PLANTERS' BANK OF MEMPHIS, TENNESSEE, PLAINTIFF IN ERROR,

vs.

THE CITY OF MEMPHIS AND JOHN ALSUP, TRUSTEE.

AND

No. 221.

THE UNION AND PLANTERS' BANK OF MEMPHIS, TENNESSEE, APPELLANT,

vs.

THE CITY OF MEMPHIS.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR AND APPELLEE.

STATEMENT OF CASE.

The Union and Planters' Bank of Memphis, the plaintiff in error, is a corporation incorporated by and under a charter granted by the General Assembly of the State of Ten-

nessee in 1858 and having its situs in the city of Memphis, Shelby county, Tennessee. Said charter contained the following provision, to wit:

"That said company shall pay an annual tax of one-half "of one per cent. on each share of stock subscribed, which "shall be in lieu of all other taxes."

The city of Memphis, in pursuance of an act of the legislature of Tennessee, assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes.

On April 3, 1899, the Union and Planters' Bank filed its bill in the circuit court of the United States for the western division of the western district of Tennessee, wherein it is averred that the law under which this assessment was made impairs the obligation of the contract contained in the clause of its charter just quoted, by which it is claimed that complainant is exempt from all taxation upon its capital stock other than that provided in its charter.

The bill further averred that in a former litigation between complainant and the city of Memphis, wherein it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889, and 1890, it was solemnly adjudged and decided by the supreme court of Tennessee that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation; and the record in said suit and the judgment of the supreme court of Tennessee is set out in full in said bill and plead and relied upon as a final judicial determination of complainant's exemption from the payment of ad valorem taxes on its capital stock to the city of Memphis

and as estopping said city of Memphis from bringing the validity or the true and proper construction of said charter provision again into controversy.

The bill also averred that the judgment so plead and set out was based upon the identical claim of exemption now asserted by complainant in order to defeat the taxes now in question, and that the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions as those appearing herein.

The bill further averred that said John H. Alsup is county trustee of Shelby county and *ex officio* collector of the ad valorem taxes due the city of Memphis.

The prayer of the bill is that the aforesaid assessment of taxes be canceled, and that complainant be declared to be contractually exempt from payment to the city of Memphis of ad valorem taxes on its capital stock.

The defendants demurred to the bill and assigned the following grounds therefor:

First. There is no diversity of citizenship, and no Federal question involved herein, and this court is without jurisdiction.

Second. The complainant has an adequate remedy at law; hence this court has no jurisdiction.

Third. The complainant, if it is entitled to any redress at all, has a plain and adequate remedy by paying under protest the tax demanded and suing to recover back.

Fourth. The former adjudication set up in the bill must be limited to the taxes actually in litigation, and the judg-

filed herein January 13, 1902, and designated by No. 221 on the docket of this court.

The case is, therefore, before this court on two records, which, by the agreement filed, are to be considered together and heard as one case.

The assignments of error in each record are substantially the same, and said assignments of error against the decree in the United States circuit court of appeals and set out in Record No. 221, page 46, are as follows, to wit:

"Comes the appellant and says that in the record and pro-
"ceedings in the above-entitled cause and court there is
"manifest error, and it assigns as error to the decree of the
"court herein entered on 21st of October, 1901:

I.

"The holding by the court that the tax laws set forth in
"the pleadings did not impair the contract between the
"appellant and the State of Tennessee, by which the appel-
"lant claimed an exemption from taxation under a provis-
"ion in its said charter, as follows: 'That the said company
"'shall pay to the State of Tennessee an annual tax of one-
"'half of one per cent. on each share of capital stock sub-
"'scribed, which shall be in lieu of all other taxes.'"

II.

"In affirming that the former litigation between the city
"of Memphis and the appellant, where it was sought to en-
"force a municipal assessment for taxes upon its capital
"stock for the years 1888, 1889 and 1890, did not conclu-
"sively adjudge that the capital stock of the appellant was

"contractually exempt from the payment of ad valorem "taxes to the city of Memphis, and did not estop the city of "Memphis from affirming that the true and proper con- "struction and meaning of the said charter was not to ex- "empt appellants' capital stock from ad valorem taxes to "the said city."

III.

"In affirming the judgment of the circuit court of the "United States for the western district of Tennessee sustain- "ing the demurrers of the respondent to the merits."

The demurrer filed by defendant to the original and supplemental bills in the circuit court at Memphis are set out in both records and are copied in Transcript No. 67, pages 17, 18, and in Transcript No. 221, on pages 17 and 18.

BRIEF AND ARGUMENT.

For defendants and appellees it is contended, first, that the Federal courts have no jurisdiction of the case, and this contention is on following grounds:

a. There is no diversity of citizenship.

b. No Federal question.

a. The first proposition is apparent from an inspection of the pleadings. Unless the requisite Federal question is present, this diversity must exist.

Railroad Co. *vs.* Swan, 111 U. S., 379.
Vanderson *vs.* Leverett, 31 Fed. R., 376.
Burgess *vs.* Seligman, 107 U. S., 20.

b. The precise point involved herein having been determined by both this Supreme Court and the State court, there is no longer any Federal or other question as to the taxability of appellant's capital stock as contradistinguished from the shares of stock.

Shelby County *vs.* Union & Planters' Bank, 161 U.S., 150.

Union & Planters' Bank *vs.* City of Memphis, 101 Tenn., 168.

2.

It is further contended for appellee that the former decisions of the supreme court of Tennessee set up and pleaded by the appellant are not conclusive of this case, and that tax decisions in Tennessee are *res adjudicata* only as to taxes involved in the litigation.

Whatever may be the rule elsewhere, there is such a well defined and unbroken line of decisions in Tennessee that judgments and decrees in tax cases are limited to the taxes actually involved that, as a local question, that proposition is no longer debatable.

State *vs.* Bank of Commerce, 95 Tenn., 221.

Bank *vs.* Memphis, 101 Tenn., 167–'8.

Buchanan *vs.* Springer (Ch. App.), 35 S. W. Rep., 774.

3.

This being a local question, it is contended next that the local law as to the effect of tax judgments will be followed by this court in cases involving the construction of a State statute or a former State judgment.

In a case which was decided in the eighth circuit the learned judge rendering the decision said:

"The general rule is that the laws of the several States "shall be regarded as rules of decision in the courts of the "United States in cases to which they apply. The judiciary "act requires this, and it would be the law independently of "that enactment. Under this rule the first question which "confronts the Federal appellate court is, What is the local "law applicable to the case?

"The local law which forms the rule of decision may "consist of a statute, or of the decisions of its supreme court, "or both," etc., etc.

Bergman *vs.* Bly, 66 Fed. R., 43.

"The inquiry is what is the settled law of the State at the "time the decision is made? This constitutes the rule of "property within the State by which the rights of the liti- "gant parties must be determined. As the Federal courts "profess to be governed by this rule, they can never act in- "consistently by enforcing it."

Lavin *vs.* Emigrant Sav. Bank, 1 Fed. R., 650.

Shelby *vs.* Gay, 11 Wheaton, 367.

Green *vs.* Neal's Lessees, 6 Pet., 299.

"The exposition given by the highest tribunal of the "State," said Justice Shiras in a case involving the contention that a State statute impaired the obligation of a contract, "must be taken as correct so far as contracts made under "the act are concerned."

Morley *vs.* Lake Shore R'y Co., 146 U. S., 166.

"It is a well-settled principle that the decisions of the "State courts in the construction of a State constitution and "laws are to be adopted by the Federal courts. This doc- "trine is established by numerous decisions."

Insurance Co. *vs.* Iron Co., 42 Fed. R., 376.

Further decisions upon this subject are as follows:

R. R. Co. *vs.* Blossburg *et al.*, 20 Wallace, 137–143.
Bank *vs.* Bank, 136 U. S., 235.
Lawton *vs.* Young, 52 Fed. Rep., 439.
Sanford *vs.* Roe, 69 Fed. R., 546.
Bauserman *vs.* Blunt, 147 U. S., 647.
Thompson *vs.* Sawyer Co., 57 Fed. R., 1030.
Bergman *vs.* Bly, 66 Fed. R., 40.
Luther *vs.* Borden, 7 How, 1.
Lavin *vs.* Sav. Bank, 1 Fed. R., 641.
Christy *vs.* Pidgeon, 4 Wall., 196.
Leffingwell *vs.* Warren, 2 Black, 603.
R. R. *vs.* Trust Co., 82 Fed. R., 124.
Hill *vs.* Hite, 85 Fed. R., 268.
R. R. Co. *vs.* Reed, 80 Fed. R., 234.
Rice *vs.* Adler, 71 Fed. R., 151.
Hodgson *vs.* Burleigh, 4 Fed. R., 121.
Durden *vs.* Malloy, 43 Fed. R., 407.
R. R. Co. *vs.* Guest, 84 Fed. R., 628.
Southerland *vs.* Village of Ernst, 86 Fed. R., 597.

It is the contention, therefore, of appellee that the rule of decision in Tennessee upon the question of *res adjudicata* constitutes a property rule, as well as its decisions upon its

statute laws, which rule of decision the Federal courts have repeatedly announced they will follow.

Thus the decision of the court in the Kentucky Bank cases, while involving an exemption clause which is entirely different from the one under consideration here, was in line with the decision of the Kentucky courts upon the question of the estoppel of a judgment in tax cases.

It was said in the following case:

"It is well settled that if a contract be valid under the "law as previously expounded by courts, and as understood "at the time, no subsequent judicial action will render it "invalid. Parties have the right to, and do contract with "a view to the law then so declared. It is equally just that "the same rule should apply as to duties required of them, "such as the listing of their property for the payment of "taxes, etc."

Franklin Co. *vs.* Louisville R. R. Co., 84 Ky., 65.
Citing Alcott *vs.* Supervisors, 16 Wall., 678.

In Louisiana the express question whether a former adjudication in a tax suit is *res adjudicata* as to taxes for other years, according to the State rule of decision, seems never to have arisen or been decided. Hence the supreme court in the Louisiana cases relied on by appellant followed the general rule of applying its own interpretation to an open question.

The decision of the Tennessee court on the question of *res adjudicata* as to taxes is that the rule does not apply to taxes accruing subsequent to the decision; and upon the question of the liability of the appellant's capital stock to

taxation in favor of the taxing power, the decision of the supreme court of Tennessee in Bank *vs.* City, 91 Tenn., 547, and of the Supreme Court in 161 U. S., 150, unless the former decision of the supreme court of Tennessee constitutes an estoppel, are the law governing the case today.

Concerning the decision relied upon as an estoppel, the supreme court of Tennessee said:

"It is well known that the opinion of this court in State "*vs.* Union & Planters' Bank, 7 Pickle, 551, was brought "about by what this court deemed to be the true construc- "tion and effect of the opinions in the Farrington case, "95 U. S., and the Bank of Commerce case, in 104 "U. S." * * *

And as to the plea of *res adjudicata* raised in that case:

"It would be strange if, under a Constitution such as ours, "a mistaken judgment of this court, declared in most em- "phatic terms not to be its own judgment, but to have been "rendered in supposed obedience to that of an appellate "tribunal—the United States Supreme Court—can be in- "voked as a judgment estoppel, now that the same appellate "tribunal has decided that identical question in favor of the "State, and against the bank, and that this court was mis- "taken in its rendering of their former opinions."

Bank *vs.* Memphis, 101 Tenn., 164–'5.

And the Supreme Court of the United States in the case referred to by the learned justice of the Tennessee supreme court, speaking by Mr. Justice Peckham, said of the Tennessee adjudication, set up as *res adjudicata*:

"Generally the courts of that State held, before the decision "by this court of the Farrington case, that the charter tax "was laid upon the corporate capital stock, and the exemp- "tion was of that stock from any further tax. Subsequently "to the decision in that case, the State courts have held that "under the construction given to the clause in the Farrington "case, and in Bank *vs.* Tennessee, 104 U. S., 493, the tax was "on the shares, and the exemption covered both capital stock "and the shares thereof."

"The decision giving exemption to both classes of property "was adjudged alone upon the authority of the case cited. "In such a case as this, where we are to construe the mean- "ing of the clause of the statute as to what contract is con- "tained therein, and whether the State has passed any law "impairing its obligation, we are not bound by the previous "decisions of the State courts, except when they have been "so long and so firmly established as to constitute a rule of "property (which is not the case here), and we decide for "ourselves independently of the decisions of the State courts, "whether there is a contract, and whether its obligation is "impaired."

Shelby County *vs.* Union, &c., Bank, 161 U. S., 151.

If the decision relied upon as *res adjudicata* was not controlling of this court in the case just cited—Shelby County *vs.* Union & P. Bank, 161 U. S., 151—it is not controlling in the present case. The former adjudication, rendered by the supreme court of Tennessee under a misapprehension of the United States Supreme Court's holding, may properly be, and should be, disregarded by this court in the present case as it

has been by the subsequent decisions in Tennessee and in this court.

It is further contended for the appellee that the defense of *res adjudicata* predicated upon the 7th Pickle case is not well founded, because we have already fully shown that according to the local rule of decision in Tennessee taxes for different years are not considered the same subject-matter, and the doctrine of *res adjudicata* does not apply.

State *vs.* Bank of Commerce, 95 Tenn., 221, and other authorities *supra.*

The litigation was, moreover, between the State and the bank, under the framing which the law required tax suits to assume at that time, and the suit was *res inter alios acta.*

The statute under which the decision relied on was rendered, while similar to that under which the taxes involved were assessed, is not the same statute or subject-matter. The principle involved, therefore, is *stare decisis* and not *res adjudicata.* The later act repealed the former one under which the decision was rendered. No contract rights were entered into on account of that decision. In such cases an adjudication as to taxes assessed under the former act has been held not to be *res adjudicata* as to taxes assessed under the latter.

In the following case from Iowa it was said:

"In addition to what has been above said on this point, it "may be further remarked, that the statute under which the "former judgment was rendered was repealed by chapter "196 of the Laws of 1868, which took effect April 29th, "1868, and this act was superseded by chapter 106 of the "Laws of 1870. Thus the taxes of 1868 and subsequent "years were levied under statutes passed after the adjudica-

"tion pleaded as an estoppel; and while the act of 1868 is "similar in its main features to the act of 1862, which was "in force when the injunction decree was rendered, yet a "judgment involving the construction of a statute, and turn- "ing upon such construction, cannot be invoked, after its "repeal as an estoppel as to the law under a subsequent "statute though similar in its provisions; for this would "deny to the court the power to determine whether the "subsequent statute should receive the same or a differ- "ent interpretation from that placed upon the repealed "statute. It would tie the hands of the court and prevent "a construction of the subsequent statute. This cannot be "allowed. The former decision may be *authority* in a case "arising under the subsequent statute, but it cannot be ad- "mitted as an estoppel upon the law questions involved in the "subsequent action."

In this case it was held:

"Each year's taxes constitute a distinct and separate cause "of action. They do not in any sense grow out of the same "transaction."

Davenport *vs.* Railroad, 38 Ia., 640.

4.

The present law, as announced by this court and the supreme court of Tennessee, is controlling in this case.

It is contended for the appellee that if the decision by the Tennessee court in Memphis *vs.* Bank *et al.*, 91 Tenn., 546, be considered as an adjudication at all, which we submit it is not, as it has been expressly held by the supreme court of that State to have been made under a misapprehen-

sion of this court's holding in the Farrington case, that the effect of the decision in U. & P. Bank *vs.* City of Memphis, 101 Tenn., 154, would be to overrule that case, and hence the doctrine of *res adjudicata* would not apply.

"The inquiry is, what is the settled law of the State at "the time the decision"—the decision in this case—"is made?"

Lavin *vs.* Emigrant, &c., Bank, 1 Fed. R., 650.

The Federal courts have repeatedly affirmed this doctrine—that on local questions they would follow the latest decisions of the State court, even though they overturned former decisions, *where no contract rights had been entered into upon the strength of the former adjudication.* And here permit us to direct attention to the fact that no contract rights whatever involved in this case have been entered into upon the strength of the alleged adjudication of Memphis *vs.* Bank, 91 Tenn., 546, for the charter involved here was accepted by the bank long before such decision and could not possibly have been entered into upon any supposed rights fixed by that decision. It was not as if this decision had been read into its charter. The annulling of that decision did not violate any contract right obtained on account thereof.

"The construction given to a statute of a State by the "highest tribunal of such State is regarded as a part of the "statute and is as binding upon the courts of the United "States as the text. *If the highest tribunal of the State "adopt new views as to the proper construction of such statute "and reverse its former decisions, this court will follow the latest "settled adjudications.*"

Bauserman *vs.* Blunt, 147 U. S., 654.

"It is well settled that these courts in construing the "statute laws of the several States will follow the latest de- "cisions of the court of last resort in the particular State "whose statute is before the court for construction."

Thomas *vs.* Burney, 35 Fed. R., 115.

There are three State statutes involved in this case, to wit, the two private statutes constituting the appellant's charter and amendment thereof and the public statute alleged to be in violation of its rights under its charter, together with the State's rule of decision upon the question of *res adjudicata* with reference to taxes. We submit that the rule announced in the foregoing quotations should control this case, to wit, that the settled law of Tennessee, at the time the decision in this case is made, should govern.

Under the Tennessee doctrine there is no such thing as *res adjudicata* in tax cases, except for the particular taxes involved. This works no greater hardship upon the litigant than the rule limiting the judgment estoppel to the specific thing involved in matters other than taxes. The question is rather one of *stare decisis* than *res adjudicata*, and it has been said that "there is no vested right to claim the benefit "of any particular decision of a court."

Talliaferro *vs.* Barnett, 47 Ark., 359.

The decisions of the Federal courts where former adjudications of the State courts have been held to be judgment estoppels are in all cases where such decisions amount to a rule of property or where contracts rights have been entered into upon the assurance afforded by the decisions. The judgment relied on by appellant constitutes no such rule of

property, as has already been held by this court in case of Shelby Co. *vs.* Union, &c., Bank, 161 U. S., 151.

Such were the considerations governing this court in the case of Kenosha *vs.* Lamson, 9 Wall., 477; Lee Co. *vs.* Rogers, 7 Wall., 181, and kindred cases.

As already shown, the last adjudications of the State court constitute the rule of decision in this court where previous adjudications do not constitute a rule of property, and that therefore the weight and effect of such former State judgment is a local question.

In the Kentucky Bank cases relied on by appellant it was said that the rule that the Federal courts will not follow the construction of the State courts where a State law impaired the obligation of a contract was limited to cases where the judgment of the State courts was under direct review. The judgment of the State court is not under review in this case, but the judgment of the circuit court of the United States. Hence the latest judgment of the State court is controlling.

Other cases are—

Bank of Ky. *vs.* Stone, 88 Fed. R., 397.
Bauserman *vs.* Blunt, 147 U. S., 647, *supra.*
Morely *vs.* Lake Shore R. R., 146 U. S., 162.
Miller *vs.* Swan, 150 U. S., 132.
Traction Co. *vs.* Belt R. R. Co., 151 U. S., 137.
Marchant *vs.* R. R. Co., 153 U. S., 380.
Fallbrook *vs.* Brawley, 164 U. S., 112.
Bank *vs.* Chehalis, 166 U. S., 440.
Wilson *vs.* So. Carolina, 169 U. S., 586.
R. R. *vs.* Nebraska, 164 U. S., 403.
Bank *vs.* Pennsylvania, 167 U. S., 461.

5.

The capital stock of appellant is by law subject to taxation.

The first assignment of error by the appellant raises this question of the liability of its capital stock to taxation, and it is contended for the appellee that it is so liable, and that the question of such liability has been settled.

What is, under the decision, the present law as to the taxability of appellant's capital stock?

In considering this question, appellant's contention that there has been no decision of either the Federal or State courts upon the question is necessarily answered.

The proposition of the appellant is that the taxability of its capital stock was not decided in either Memphis *vs.* Bank, 15 Pickle (101 Tenn., 547), or Union & P. Bank *vs.* City of Memphis, 161 U. S., 150.

There were two contentions made by the bank in the State court in the first case referred to, the first being—

"(1.) That the capital stock of said Union and Planters' "bank is exempt from general taxation by its charter or act of "incorporation, which provides," &c., quoting the exemption clause.

(2.) The second contention was that, even if the decision should be against the bank on the first proposition, it must escape taxation because of the defect in the act of 1895, which has been cured by the Tennessee acts of 1897 and 1899—that is to say, that any banking corporation whose shares of stock are exempt shall pay upon its capital stock.

The question of the taxability of appellant's capital stock was therefore expressly before the court for decision in that case; was so treated and fully considered by the Tennessee court. All the questions raised here were raised in that case by the bank, the appellant here, including the plea of *res adjudicata*, the 7th Pickle case. The appellant here certainly considered that question as being involved in that suit. The decision was that the bank was subject to taxation upon its capital stock, but because of the defect of the act of 1895—a technicality—it would escape for the time being. We submit that the decision has all the force of an adjudication, and was so considered by all the parties to that suit, and by the court.

It was said in the case now commented upon:

"It is not insisted by the bank that there is a judgment "estoppel against the county, nor could such an insistence "prevail, since the county was not a party to the two cases "now relied on as adjudicating the question here presented."

So that a decision in favor of the appellant here would result in the inconsistency that the bank would be liable for State and county taxes upon its capital stock, but not to the city, whose taxes are based upon the State and county assessment.

Nor is the proposition tenable that the taxability of appellant's capital stock was not involved in or under consideration in Shelby Co. *vs.* U. & P. Bank, 161 U. S., 150. The question of the taxability of the capital stock was treated by the court as controlling of the question of the taxability of the surplus, the two being *ejusdem generis*, and the status of one necessarily determined in fixing the status of the other.

That the decision in 161 U. S. was based upon the proposition that the capital stock is taxable is too plain for debate. The Supreme Court said in the two concluding paragraphs of the opinion:

"We have found no case in this court which is authority "for the proposition that language such as is under consid- "eration in this case exempts from further taxation both "the capital stock of the corporation and the shares of stock "in the hands of the individual shareholders. As the Far- "rington case decides that this language does import that "the charter tax is laid upon the shares in the hands of the "individual shareholders, and that those shares are exempt "from further taxation, that question is set at rest, and there "being nothing in any case which extends that language to "both properties, *we hold that when it is made applicable to "the separate shares in the hands of the individual shareholders "it does not apply to or cover the case of the capital stock of the "corporation, and such stock is liable to be taxed as the State "may determine.*"

"This determines the liability of the capital stock of the "Union and Planters' bank to taxation, and of course it "overrules any claim on the part of that bank for exemp- "tion from taxation of its surplus or accumulated profits. "The question whether such surplus could be taxed if the "capital stock itself were to be regarded as exempt has also "been decided in the preceding case of the Bank of Com- "merce. The decree of the circuit court must therefore be "reversed," etc., etc.

Shelby Co. *vs.* U. & P. Bank, 161 U. S., 161.

Upon the authority of these cases, the question involved in this case is no longer an open one of any sort.

In addition to the foregoing, we beg leave to submit in support of the contentions herein set forth the able and learned opinion of Judge Lurton, delivered in this case in the circuit court of appeals, at Cincinnati:

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

THE UNION AND PLANTERS' BANK OF MEMPHIS, *Appellant*, *vs.* THE CITY OF MEMPHIS, *Appellee*. } No. 924.

Appeal from the circuit court of the United States for the western district of Tennessee.

Submitted June 10, 1901; decided October 21, 1901.

Before Lurton, Day, and Severens, circuit judges.

The case is this: In 1859 the State of Tennessee, by its General Assembly, granted a charter under which the Union and Planters' bank was organized. That charter contained a provision upon the subject of taxation in these words: "That said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

The complainant's bill avers that in impairment of the obligation of this contractual exemption from every tax except that provided by the charter, the State of Tennessee has passed a law providing, among other things, for the assessment of State, county and city taxes upon the capital stock of this and all other corporations having like contractual exemptions, and that the city of Memphis under

and in pursuance of the legislation referred to has assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes exceeding $2,000.00, and is about to distrain, etc.

It is averred that the law under which this assessment has been made impairs the obligation of the contract by which complainant is exempt from all taxation upon its capital stock other than that provided for in its charter. It is then averred that in a former litigation between this complainant and the city of Memphis where it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889 and 1890, it was solemnly adjudged and decided that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation. The record in the said suit and the judgment therein rendered, being a judgment of the supreme court of Tennessee, is set out in full and plead and relied upon as an adjudication estopping the said city of Memphis from bringing the validity or the true and proper construction and meaning of said provision again into controversy. The bill is most specific in averring that the judgment so plead and set out as establishing the exemption of its said capital stock from taxation was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and that "the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions" as those appearing herein.

Upon this former judgment between the same parties and upon the same facts and issues the complainant bank avers and contends that the question of the right of the city of Memphis to assess its capital stock "has been finally judicially determined not to exist, because of the judicial construction put upon its exemption in the suit to determine that question between it and the said city of Memphis."

The defendant filed a demurrer assigning no less than

twelve reasons why the complainant's bill should not be sustained. This demurrer was sustained and the bill dismissed.

LURTON, circuit judge, having made the foregoing statement of the case, proceeded then to deliver the opinion of the court:

1. The demurrers which go to the jurisdiction of the court are not well founded. The jurisdiction does not depend upon diversity of citizenship, for that does not exist, but upon the Federal question arising out of the alleged violation of the obligation of the contract contained in the charter of the complainant corporation.

The bill attacks the constitutionality of the revenue laws of 1897 and 1899 so far as they authorize the imposition of a tax upon the capital stock of the Union and Planters' bank as a law impairing the obligation of the charter exemption (Bank of Kentucky *vs.* Stone, 88 F. R., 383, 390; Stone, auditor, *vs.* Farmers' Bank of Kentucky, 174 U. S., 409, 412).

2. Neither is the demurrer to the equitable jurisdiction of the court well founded.

The remedy by suit at law to recover a tax paid under protest given by the Tennessee act of 1873, ch. 44, being section 1059 Shannon's Revision of the Tennessee Code, applies only to revenue due the State (City of Nashville *vs.* Smith, 2 Pickle, 213).

It has no application where the tax complained of is one assessed by a county or city. In such case the only legal remedy to recover an illegal tax is that furnished by the common law (Railroad *vs.* Williams, 101 Tenn., 146).

There must exist some equitable ground for relief besides the mere illegality of the tax. If it appears that the tax constitutes a cloud upon the title of the complainant, or that he will be subjected to irremediable damages, or to a multiplicity of suits, if compelled to rely upon his legal remedy

alone, equity will interpose upon the ground of the inadequacy of the remedy at law (Dows *vs.* Chicago, 11 Wall., 198; Union Pacific R'y. *vs.* Cheyenne, 113 U. S., 516, 525; Ogden City *vs.* Armstrong, 168 U. S., 224, 238; Bank of Kentucky, *vs.* Stone, 88 F. R., 383).

The case made by the bill is not the case of an objection to a single or particular assessment. The complainant sets up a claim of complete exemption not only against the particular assessment, but against all future efforts to assess its capital stock. As observed by Chief Justice Marshall in Osborn *vs.* Bank, 9 Wheat., 738, 842, "the single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege."

The bill in substance avers that there have been many previous litigations between the complainant and the State of Tennessee, the county of Shelby and the city of Memphis, in which the right to levy taxes upon its capital stock was asserted and the exemption claimed under the charter was denied. Complainant sets out in full one such former litigation with the city of Memphis, resulting in a judgment of the supreme court of the State judicially determining the exemption of its capital stock from any and all taxes other than the charter tax.

Notwithstanding these former litigations the defendant is charged with persisting in a denial of the exemption claimed. Under such circumstances it would appear that the complainant is entitled to the remedy in chancery for the purpose of preventing repetitions of such assessments in the future, and thereby preventing a multiplicity of suits (Bank of Kentucky *vs.* Stone, 88 F. R., 383, 392; Morris Canal & Banking Co. *vs.* Mayor of Jersey City, 12 N. J. Eq., 227; High on Inj., sec. 530).

3. Is the capital stock of the complainant company contractually exempt from taxation other than the charter tax

of one-half of one per cent. on each share of stock subscribed?

Does this exemption apply to the corporate capital in the hands of the corporation, or to the shares of capital stock in the hands of shareholders, or are both species of property equally exempt from any tax other than that payable by the express provision of the charter?

Curiously enough we are not lacking in very high authority upholding each of three possible constructions of the taxing clause of the complainant's charter.

Thus in Memphis *vs.* Farrington, 8 Bax., 539, the supreme court of Tennessee held that language similar and identical in meaning found in the charters of a number of Tennessee banks and insurance companies operated only to exempt the capital stock of such corporation in the hands of the corporation upon the payment of the charter tax stipulated for, but that shares of stock, being a distinct property, were not exempt, but were subject to taxation in the hands of shareholders. This decision was made in 1876, in a case between a stockholder in the complainant bank, as well as in other corporations, in which Farrington stood for and represented the entire class of stockholders, the city of Memphis and the State of Tennessee being the adversary parties. The complainant corporation was not a party to the suit and the real question involved was that of the taxability of shares of stock in the hands of shareholders.

That case was taken, on writ of error, to the Supreme Court of the United States and there reversed, that court holding in an opinion by Justice Swayne, that the exemption granted extended to the shares in the hands of shareholders. Three members of the court dissented, holding that the exemption did not extend to shareholders, and that the judgment of the Tennessee court should be affirmed. The judgment of the Tennessee court was accordingly reversed and the shareholders held to be exempt from any

tax other than that stipulated to be paid by the corporation (Farrington *vs.* Tennessee, 95 U. S., 679).

In Bank of Commerce *vs.* McGowan, 6 Lea, 703, the liability of the Bank of Commerce to be assessed upon its bank building and upon several parcels of realty bought in payment of debt was involved.

The court held that the bank building was exempt under a provision of the charter providing that the bank "shall pay to the State an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes," but that this exemption would not extend to the real estate bought in satisfaction of debt due the bank. This result was reached upon the assumption of the exemption of the capital stock of the bank and upon the authority of the case of the De Soto Bank *vs.* Memphis, 6 Bax., 415, where it was held that the bank's power to hold real estate was limited by the charter to the real estate necessary for the conduct of its business and the corporate capital used for the purposes of the corporation, and that the contract ceased to operate when taxable property was held for other purposes. In respect of the opinion of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679, Judge Cooper, speaking for the court, said:

"There is nothing in conflict with this view, as the learned counsel of the complainant seem to think, in the decision of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679. It was there held that the provision in a bank charter, like the one before us, is a contract, and will protect the shares of the stockholders from additional taxation. We recognize the controlling authority of that court in such cases, and yield to its decisions. The provision in question will, therefore, protect the capital stock and the shares of the stockholders from any taxation beyond that prescribed in the charter."

That case was affirmed upon a writ of error sued out by the bank, the case being reported as the Bank of Commerce *vs.* State of Tennessee, 104 U. S., 493. Both of these decisions were made in 1881.

The next opinion in point of time proper to be referred to is that of The City of Memphis against The Union and Planters' Bank, the appellant herein, in which the city sought by a bill in equity to compel the payment of city taxes for the years 1887 to 1891, inclusive, assessed upon the corporate capital of the bank. The bill also sought to compel the payment of a privilege tax for the years 1889, 1890 and 1891 imposed by the city for the right of exercising its franchises of doing a banking business in the city.

The bill averred that the bank claimed an exemption from all taxation upon its capital stock as distinguished from the shares in the hands of stockholders by virtue of the charter contract heretofore set out, and claimed that it was neither subject to the ad valorem or privilege tax which had been imposed, and therefore refused to pay. The contention of the city as set out on the face of its bill was that the true and proper interpretation of the charter exemption referred to was to exempt the shares in the hands of shareholders from any tax other than that which the bank was required to pay under its charter, and that the corporation as such was liable to pay taxes upon its capital stock and upon its franchises notwithstanding the terms of the charter.

The court sustained the demurrer of the defendant bank and dismissed the bill, holding that the bank was exempt from both species of tax by reason of its charter exemption.

Touching the former decisions of the court construing and applying the charter exemption involved, Judge Caldwell, speaking for the court, said:

"Since the decision in the Farrington case by the Supreme Court of the United States, this court has uniformly adhered to its previous holding, that no ad valorem tax can lawfully

be laid on the capital stock, and, in recognition of that decision, has gone further, and said that shares of stock are likewise exempt from other taxation than that prescribed in the charter" (Bank of Commerce *vs.* McGowan, 6 Lea, 705; The State *vs.* Butler, 13 Lea, 406; The State *vs.* Butler, 2 Pickle, 633).

Continuing, the learned judge said:

"Considering the decisions of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679, and in Bank *vs.* Tennessee, 104 U. S., 493, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank on its capital stock or against owners on shares of stock. Under the construction there given, the charter exemption includes both.

"As an original question, we would hold as held by this court in Memphis *vs.* Farrington, 8 Bax., 539, and charge the stockholders with an ad valorem tax; but upon authority, we hold as stated abode.

"This court has never decided, and, in the absence of the ruling of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679, would not now decide that the charter gives the owners of shares of stock any immunity or exemption from taxation on the shares. That question is now adjudged alone upon the authority of that case. It did not arise, and was not adjudged, in Bank of Commerce *vs.* McGowan, 6 Lea, 705; in The State *vs.* Butler, 13 Lea, 406, or in The State *vs.* Butler, 2 Pickle, 633.

"Complainant seeks, in addition to what has already been stated, to recover from the bank $1,800.00 as privilege taxes for the years 1889, 1890 and 1891. These taxes are claimed from the corporation for the right of exercising its franchises—for the privilege of doing a banking business. Manifestly, the charter tax was intended to cover this right or privilege. The language of the charter implies, that, in consideration of the public good and the payment of the tax therein specified, the State will allow the corporation to exercise the franchises granted without further taxation (City of Memphis *vs.* Hernando Ins. Co., 6 Bax., 527; Union Bank *vs.* State, 9 Yerg., 490).

"The case of New Orleans City, etc., *vs.* New Orleans, 143 U. S., 192, is not, as we understand it, an authority against this ruling. There the contract afforded 'no evidence of an intention' to exempt the corporation from license or privilege tax (*ib.*, 195); here the intention to do so is clear and unmistakable. The charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them. No other reasonable construction can be placed upon the words of the charter.

"The State is bound by its contract; and so, likewise, is the city of Memphis, which is but an arm or agency of the State government. This is true not only as to privilege taxes, but also with respect to the other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality.

"As to those subjects, the specified tax is in lieu of all the other taxes—State, county and municipal. Such is the undoubted meaning of the contract (City of Memphis *vs.* Hernando Ins. Co., 6 Bax., 527; Union Bank *vs.* The State, 9 Yerg., 490; Nashville *vs.* Thomas, 5 Cold., 600)."

The effect of the judgment in the case last cited as an estoppel and bar to the assessment of taxes upon the capital stock of the appellant bank by the city of Memphis is the principal question in the case now before us.

For the present, however, we will continue the history of the litigations which involve the extent of the exemption.

The next decision in point is that of Shelby County *vs.* Union & Planters' Bank, 161 U. S., 149. In that case the charter exemption here involved was construed as not including capital stock or surplus and accumulated profit, and as exempting only the shares of stock in hands of the shareholders. The Farrington case, 95 U. S., 679, is there construed as not inconsistent with the conclusion stated.

After the decision last cited the city of Memphis again sought to tax the capital stock of the complainant bank and assessed same for the years 1896 and 1897.

The bank filed its bill in a chancery court of the State to enjoin the city from enforcing the collection of said tax and set out in its said bill two distinct grounds upon which it resisted the enforcement of said assessment.

1. That its capital stock was exempt under the charter provision already mentioned, and that such exemption had been duly adjudged in previous litigations which had the force of *res adjudicata*.

2. That the revenue law of the State provided that "no tax shall hereafter be assessed upon the capital stock of any bank, banking association or loan or trust, insurance or investment companies, but the shareholders in such bank or other association shall be assessed and taxed upon the market value of their shares of stock herein."

The city answered, asserting its power to make said assessments, and denied the exemption of the complainant's capital stock under its charter, and denied the force of the former decision as *res adjudicata*. After answering, the city filed a cross-bill for the purpose not only of enforcing the payment of the ad valorem tax so assessed against the capital stock of said bank, but also for the purpose of compelling payment of certain privilege taxes due the city for the same year.

Upon the pleadings and proofs the chancellor held the bank not liable for either tax, and perpetually enjoined the city from enforcing payment and dismissed the cross-bill. From this decree the city appealed to the supreme court of the State of Tennessee, which reversed the decree of the court below, holding that the capital stock was not exempt, but that the particular assessments complained of were invalid because the revenue law of the State did not provide for the assessment of the capital stock of any bank. It further held that the privilege tax was authorized under the existing law and the bank liable therefor.

In respect to the force and effect of the former decision of the same court adjudging the capital stock not liable to any general taxation as *res adjudicata*, the court held:

1. "That the effect of the decision in favor of the exemption of such capital stock from general taxation was nullified by the later decision of the Supreme Court of the United States in the case of Shelby County *vs.* Union and Planters' Bank, 161 U. S., 149, holding that the charter exemption had no application to corporate capital stock."

2. "That its former judgment involved a different cause of action, to wit: The taxes assessed for years prior to the assessment then complained of, and that 'the plea of *res adjudicata* is to be limited to the taxes actually in litigation and is not conclusive in respect of taxes assessed for other and subsequent years.'"

It is plain from this history of the litigation involving the scope of the charter exemption claimed, and of like exemptions in other charters, that as a mere question of authority the exemption claimed in favor of appellant's capital stock does not exist, and that this court in the interpretation of the charter exemption should accept as authoritative the opinion of the Supreme Court of the United States in Shelby County *vs.* Union and Planters' Bank, 161 U. S., 149.

But the duty of interpreting the scope and meaning of the exemption clause may be regarded as eliminated if it be true, as claimed, that the exemption exists as claimed because it has been so determined by the judgment relied upon as *res adjudicata*.

On this point, in New Orleans *vs.* Citizens' Bank, 167 U. S., 371, 387, Mr. Justice White, speaking for the court, in a case where a charter exemption was claimed from general taxation by force of certain former judgments, said:

"Of course, if the judgments are the things adjudged and conclusively determined as between parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question."

Passing then the interpretation of the scope of the charter exemption as an original question, and as affected by the

decisions heretofore made considered as mere authorities, we come to the examination of the effect of the judgment of the supreme court of Tennessee pronounced in a suit wherein the present complainant and appellant, The Union and Planters' Bank and The City of Memphis, the present defendant and appellee, were adversary parties; and in which it was adjudged and determined, that the charter tax of one-half of one per cent. was in lieu of all other taxes against the capital stock of said bank as well as against the stockholders upon their shares of stock, and that the capital stock of said bank was not liable to the assessment which had been made, nor for the license or privilege tax asserted against it.

That the suit in which said judgment was rendered was in the name of the State for the use of the city of Memphis, is of no moment.

The city was the real party and is as much concluded as if the suit had been prosecuted directly by it (New Orleans *vs.* Citizens' Bank, 161 U. S., 371, 388; Scotland County *vs.* Hill, 112 U. S., 183).

We come then to the question of the efficacy of the judgment in the prior case as adjudging conclusively that an exemption exists which extends to the capital stock of the complainant bank. The city taxes involved in the prior case were those assessed upon complainant's capital stock by the city of Memphis for the years 1888 to 1891, inclusive.

The taxes involved in the present case are taxes assessed by the same municipality and upon the same capital stock for the year 1899.

The cause of action in the two cases is, therefore, not the same, inasmuch as the demand in the adjudged case was taxes of certain years other than the years involved in this suit.

But the question of exemption of the capital stock from taxation other than that stipulated in the charter was necessarily presented and determined adversely to the claim of

the city of Memphis, upon identically the same facts upon which the right of exemption is now claimed.

Under the decisions of the Supreme Court of the United States, the mere fact that the present demand is for a tax for one year, and the demand in the adjudged case was for taxes for other and antecedent years, "does not prevent the operation of the thing adjudged" (New Orleans *vs.* Citizens' Bank, 167 U. S., 371, 396, 398; Southern Pacific R. R. *vs.* U. S., 168 U. S., 1, 52; New Orleans *vs.* Citizens' Bank).

In New Orleans *vs.* Citizens' Bank, the court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

"This," said the court, "is the elemental rule, stated in the text books and enforced by many decisions of this court."

Among the cases cited as supporting this principle are the cases of Bank *vs.* Beverly, 1 How., 134, 139; Cromwell *vs.* Sac County, 94 U. S., 351, 353, and Last Chance Mining Company *vs.* Tyler Mining Company, 157 U. S., 683, and the case of Heroman *et al.* *vs.* Louisiana, 34 La. An., 805, 814.

This well-settled rule was applied in a case in which the controversy was as to the efficacy of prior judgments upon demands for taxes for years other than those involved in that case, which judgments had been rendered in local courts of the State of Louisiana. In that case it was also contended that public policy forbade the application of the principle stated to controversies as to taxation. After saying that this argument, if meritorious, should be addressed to the law-making and not to the judicial department, Mr. Justice White said, that "it was without real

merit." "In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the Government, declaring a particular tax or burden unconstitutional, imparts no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

But the defendants say, that whatever the efficacy of such a judgment ordinarily the judgment plead in bar and as a conclusive adjudication of the question of exemption here involved, is a judgment of the supreme court of Tennessee, and that under the well-settled rule of that court a judgment in a tax case is not conclusive between the parties except as to the particular taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years when relied upon as *res adjudicata* (State

vs. Bank of Commerce, 95 Tenn., 231; Bank *vs.* Memphis, 101 Tenn., 154, 167).

The opinion of the court in that case was by Judge McAllister, who, upon this subject, said:

"We think the plea of *res adjudicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in New Orleans *vs.* Citizens' Bank, 167 U. S., 371, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved.

"In State *vs.* Bank of Commerce, 95 Tenn., 231, we said: 'These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case,' citing Cromwell *vs.* County of Sac, 94 U. S., 351; Nesbett *vs.* Riverside Ind. Dist., 144 U. S., 610; W. & W. R. R. *vs.* Alsobrook, 146 U. S., 279; Keokuk R. R. *vs.* Missouri, 152 U. S., 301. We adhere to that ruling."

The effect of the judgment in Bank *vs.* Memphis as *res adjudicata* in avoiding the efficacy of the prior judgment now relied upon as *res adjudicata* is not now before us, inasmuch as that judgment has not been plead or proven, the present hearing being upon a demurrer to the bill of complainant which does not set out the judgment in the case referred to (Turley *vs.* Turley, 85 Tenn., 252, 261; Jourolmon *vs.* Massengill, 86 Tenn., 81; Daniels Eq. Pl., 659, 661; United States *vs.* Bliss, 172 U. S., 321; Bryan *vs.* Campbell, 177 U. S., 649; Freeman on Judgments, sections 283, 332).

The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists giving it immunity from the tax here involved, which judgment has no force or effect in the court which rendered it other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and

usage of that State, "is not conclusive in respect of taxes assessed for other and subsequent years."

The exemption from the ad valorem taxation of its capital stock claimed in this suit exists only, if it exists at all, by reason of the conclusive character of the thing adjudged in the prior case. But if that judgment would not be conclusive in respect to taxes for other years in the courts of the jurisdiction in which it was pronounced, upon what principle does it become of any greater efficacy when relied upon as *res adjudicata* in the courts of another jurisdiction?

By the law of England as it existed when the separation from our mother country occurred, foreign judgments were only *prima facie* evidence upon the merits of the matter in litigation, and when relied upon in the courts of England were subject to re-examination not only as to the jurisdiction of the court, but upon the merits. By the law of this country, a money judgment, rendered by a court of a foreign country having jurisdiction of the parties and the cause, in a suit brought by one of its citizens against one of ours, is only *prima facie* evidence and not conclusive, in an action brought here upon the judgment, when by the law of the foreign country judgments of American courts are not recognized as conclusive (Hilton *vs.* Guyot, 159 U.S., 113).

But such a judgment is conclusive, when sued upon here, as to all matters therein pleaded, and which might have been tried in the foreign court, if it be the judgment of a foreign jurisdiction, which, under like circumstances, regards the judgments of our courts as conclusive (Richie *vs.* McMullen, 159 U. S., 235).

"Before the American Revolution," says Mr. Justice Gray, in the great opinion delivered by him for the court in Hilton *vs.* Guyot, 159 U. S., 113, 181, "all the courts of the several colonies and States were deemed foreign to each other, and, consequently, judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another colony, not only as to the jurisdiction of

the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England."

"It was because of that condition of the law, as between the American colonies and States, that the United States at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the States of the Union in the courts of another of those States."

By section 1 of article 4 of the Constitution of the United States it is accordingly provided that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be, and the effect thereof."

Under this power, the Congress did, at an early day, provide, not only for the mode of authenticating the records and proceedings of the courts of any State, but enacted "that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usages in the courts of the State from whence the said records are or shall be taken" (Revised Statutes, section 905).

Judgments rendered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country only in respect to their conclusiveness upon the merits, if rendered by a court having jurisdiction over the parties and the cause of action, and this difference is wholly due to the constitutional and legislative provision already cited (Mills *vs.* Duryea, 7 Cranch, 481, 484, 485; D'Arcey *vs.* Ketchum, 11 How., 165, 175, 176; Hanley *vs.* Donoghue, 116 U. S., 1, 4).

In Wisconsin *vs.* Pelican Ins. Co., 127 U. S., 265, 292, it was said:

"Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

In Hilton *vs.* Guyot, 159 U. S., 113, 189, it was said, that "the decisions of this court have clearly recognized that judgments of a foreign State are *prima facie* evidence only, and that but for these constitutional and legislative provisions, judgments of a State of the Union, when sued upon in another State, would have no greater effect."

The statutory provision, section 905, extends to every court, "within the United States," and, therefore, to courts of the United States, and such courts are, therefore, bound to give to judgments of State courts the same faith and credit which the courts of another State are bound to accord to them (Kansas City, etc., R'd Co. *vs.* Morgan, 21 C. C. A., 468; Pennoyer *vs.* Neff, 95 U. S., 714, 733; Freeman on Judgments, sec. 575).

Neither the constitutional nor legislative provision referred to requires that any such judgment when proven in a court of the United States or of another State shall be given any greater efficacy or degree of conclusiveness than it has by the "law or usage" of the State from which it comes. The plain provision of the statute is, that such judgments "shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State from whence the said records are or shall be taken.*"

Nor does any principle of general law or natural justice demand that any greater efficacy shall be accorded to a judgment of any State or foreign country, when either sued upon or plead as *res adjudicata* in the courts of another jurisdiction,

than is accorded to it by the law or usage of the State or country from which the judgment comes.

If such judgment be given the effect and conclusiveness accorded to it at home, every demand of the positive law as well as of justice has been answered.

To give it any greater efficacy than it has in the State or country in which it was rendered would be in opposition to every principle of international law and contrary to principles of moral justice.

Those defenses which might be made to it at home and those only can be made in any other jurisdiction where it is sued upon or plead in bar. These principles find support in the utterances of a multitude of judges, though in none of the cases cited does the precise question here at issue seem to have arisen (Chicago and Alton R. *vs.* Wiggins Ferry Co., 108 U. S., 18, 20; Chase *vs.* Curtis, 113 U. S., 452, 460; Suydam *vs.* Barber, 18 N. Y., 468, 472; Renaud *vs.* Abbott, 116 U. S., 277, 287; Hanley *vs.* Donoghue, 116 U. S., 1; Candee *vs.* Clark, 2 Mich. Rep., 257; Armstrong *vs.* Carson, 2 Dallas, 302; Miles *vs.* Caldwell, 2 Wall., 35; Green *vs.* Sarmiento, 3 Wash. C. C. R., 17; King *vs.* McLean Asylum, etc., 12 C. C. A., 145, 164, 165; Wood *vs.* Watkinson, 17 Conn., 500, 504, 505; Baugh *vs.* Baugh, 4 Bibb. (Ky.), 556; Sweet *vs.* Brockley, 53 Maine, 346; Milan *vs.* Fitz James, 1 Bos. & Pul., 138; Smith *vs.* Nichols, 5 Bing., N. C., 208; Embry *vs.* Palmer, 107 U. S., 3, 10; Poorman *vs.* Crone, Wright's Rep., 347; Freeman on Judgments, section 575; Wells' *Res Adjudicata*, sec. 531; Bates Federal Eq. Practice, section 424).

In Chicago and Alton Railroad Co. *vs.* Wiggins Ferry Co., cited above, speaking of the effect to be attached to the judgment of the State of Missouri, construing a law of another State, the court said:

"So long as the judgment stands, it cannot be impeached collaterally in the courts of the United States any more than in those of the State, by showing that if due effect had been given to the laws it would have been the other way. If it

has the effect of an estoppel, as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The courts of the United States must give it the same effect as a judgment that it has in the courts of the State. Whether, as a judgment, it operates as an estoppel, does not depend on the Constitution or laws of the United States, but on the effct of a judgment under the laws of Missouri."

In Suydam *vs.* Barber, 18 N. Y., 468, 472, the suit was against the members of a firm upon a partnership obligation. One of the partners defended upon the ground that the plaintiffs had brought an action against another of the partners alone, in a court of Missouri, and recovered judgment. This Msssouri judgment was plead as operating as an extinguishment of the liability of the other partners.

According to the common law, which prevailed in New York, a judgment against one of several joint debtors, obtained in an action against him alone, was a bar to an action against the others. But it was shown that all contracts which by the common law were joint only, were by the law of Missouri joint and several, and that the effect of a judgment against one thus jointly and severally liable was not to extinguish the obligation or discharge the liability of others.

The New York court held the judgment inoperative as a bar, and, among other things, said :

"The consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, just as much as are those other common consequences of judgments, that a party may have execution upon them and that they are not re-examinable on the merits of the controversy determined by them.

"In all these particulars, the effect of a judgment, in the government where it is rendered, is the subject of positive regulation by that government, just as it is the subject of positive regulation by what process and what courts judgments shall be rendered at all."

Referring to the effect of judgments of one State when plead in another under the constitutional and legislative provisions in respect to the faith and credit to be given to such judgments by the courts of the United States and of other States, the court said:

"While the rule just stated as to the effect of judgments of one State in the courts of another is clear, as is established by the cases cited by Judge Cowen, and by numerous others, yet no case can be found where a greater effect is given to the judgment of any State in the courts of another than belongs to it in the State where it was rendered. Indeed, such a rule would be against all reason, and not only out of the policy of the provisions of the Constitution and laws of the United States on that subject, but against and irreconcilable with all policy and with the plainest and fundamental principles of justice."

Finding that under the law of Missouri the effect of the judgment was not to extinguish the obligation sued upon or discharge the other persons liable, it was held, that no greater effect should be given to such a judgment when relied upon as a bar to a suit against the other parties liable upon the original contract.

In Wood *vs.* Watkinson, cited above, the Connecticut court said:

"Taking it for granted, that when a judgment in the court of a sovereign State, or one of the States of this Union, is sought to be enforced in another State than that in which it was rendered, there is no objection to its validity on the ground of a want of jurisdiction in that court, it is well settled that no greater effect is to be given to it than it would have in the State where it was rendered. It has no higher dignity in any other State than in the one where it was pronounced; and hence, if in the courts of the State where the judgment was rendered, it is inconclusive, or if it is inquirable into there, during a particular period, or on certain conditions, it will be open to investigation, to the same extent, everywhere else (Armstrong *vs.* Carson's Ex'rs, 2 Dall., 302; Green *vs.* Sarmiento, 1 Pet. C. C. Rep.,

74; Spencer *vs.* Sloo, 8 Lou. R., 290; Curtis *vs.* Gibbs, 1 Pennington's R., 399; Baugh *vs.* Baugh, 4 Bibb, 556; Rogers *vs.* Coleman & *ux.*, 1 Hardin's R., 413, 420; Smith *vs.* Nicolls, 5 Bing. N. C., 208; 35 E. C. L., 88).

"So, if a judgment operates in the State where it was rendered only *in rem*, it will not elsewhere be enforced *in personam*. It results conclusively from this principle, or is rather involved in it, that if a judgment in a State where it is recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to it in any other State where it is endeavored to be enforced. It derives its obligation only from the laws of the State in which it is pronounced. A judgment creates a debt, on the ground that a liability is ascertained and established, by the decision of a tribunal, which might rightfully adjudicate upon it; and such adjudication derives its whole force and effect from the laws of the State under whose authority it is made." * * *

That court added:

"There is nothing in our national Constitution on this subject, which, according to any construction which has ever been claimed for it, gives the judgment of one of the States, when sought to be enforced in another, a greater effect than it would have in the State where it was rendered."

There is nothing which precludes this court from determining for itself whether the charter exemption claimed exists to the extent of granting to the appellant immunity from the ad valorem taxes assessed against its capital stock by the defendant, The City of Memphis, except the supposed conclusive effect of the thing adjudged in the prior case which is relied upon as settling the question without looking into the terms of the contractual exemption.

Finding, as we do, that the judgment in the prior case is not, under the law of Tennessee, conclusive when the second suit is a demand for taxes of other years, subsequently assessed, and that in the courts of that State neither party could plead that judgment as a bar to a suit for taxes for other years, we are, therefore, not precluded from looking

into the charter. The opinion of the Supreme Court of the United States in the two cases of Bank of Commerce *vs.* Tennessee, 161 U. S., 134, and Shelby County *vs.* Union and Planters' Bank, 161 U. S., 149, are binding authorities upon us and require that we shall hold that the capital stock of the appellant bank is not exempt from ad valorem taxation by reason of the charter exemption claimed by the Union and Planters' bank.

The demurrers which raise the question we have discussed were properly sustained and the decree dismissing the bill is accordingly affirmed.

JOHN H. WATKINS,
For City of Memphis.

Luke E. Wright.